Supreme Court, U.S.
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No. 00-1297

IN THE

Supreme Court of the United States

HORIZON AIR INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TEAMSTERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the standard of review applied by the court of appeals in reviewing a claim of constitutional infirmity brought against the National Mediation Board conforms to this Court's precedent.

2. Whether a conflict between the circuits arises from *USAirways v. NMB*, 177 F.3d 985 (D.C. Cir. 1999) and *Horizon Air Industries, Inc. v. NMB*, 222 F.3d 1126 (9th Cir. 2000).

3. Whether the conflict in principle between the Ninth Circuit Court of Appeals in *Horizon Air* and the Court of Appeals for the District of Columbia Circuit in *USAirways* is sufficiently important to justify review by this Court.

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BRIEF FOR TEAMSTERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent International Brotherhood of Teamsters, AFL-CIO, ("Union" or "IBT"), respectfully urges denial of the petition for writ of certiorari to review the judgment and order entered by the United States Court of Appeals for the Ninth Circuit on November 21, 2000.

JURISDICTION

The jurisdictional requisites are set forth adequately in the petition. Pet. 1.[1]

[1] References to the petition are designated "Pet."; references to the appendix to the petition are designated "Pet. App."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, are set forth in the petition. Pet. 1-3.

STATEMENT OF THE CASE

Relevant facts

In 1984, Horizon Air, a regional air carrier operating primarily in the northwestern United States, established a "lead captain program" with the stated goal of improving communication between the carrier's management and its pilots. The program's principal component was a committee elected by and made up of non-management pilots. The committee maintained an informal, consultative role with Horizon. All decisions concerning rates of pay, rules and working conditions were made unilaterally by the carrier.

Later, in 1988, Horizon placed all of its policies concerning pilots into a document entitled the "Flight Crew Policy Handbook" ("FCPH"). In addition, Horizon renamed the lead captain program the "Pilot Representatives Program" or "PIREPS." Representatives from PIREPS and Horizon's management signed an agreement making the FCPH a binding document, with an effective term of September 1, 1988 through September 1, 1990. Horizon told the pilots that the FCPH could be amended only by agreement of the management with approval from a majority of the pilot representatives. In 1990, the PIREPS program was formalized through the adoption of bylaws and procedures for election of officers, appointment of committees, and approval of changes to the FCPH. Horizon negotiated a new FCPH with PIREPS in 1990 and 1993.

The IBT started an organizing campaign among Horizon's pilots in late 1993 and early 1994. The campaign was

abandoned in mid-1994. It resumed in 1995 when Horizon's pilots became dissatisfied with how the carrier was administering the pilots' rates of pay, rules and working conditions. Discussions between Horizon and PIREPS broke down, resulting in the mass resignation of the PIREPS board following a March 15, 1995 PIREPS board meeting. The Board members' letters of resignation to Horizon expressed frustration at the ineffectiveness of the PIREPS program. On March 21, 1995, the PIREPS Board communicated by newsletter to the pilot group the reasons for their resignations. The newsletter article explored the option of joining a national union.

A new PIREPS board was subsequently elected by the pilots at the instance of Horizon. At the pilots' request, in the midst of strained labor relations, the Union reestablished its organization campaign. The IBT issued a newsletter on March 30, 1995, announcing the launch of the pilots' new organization campaign. On April 3, 1995, Horizon's Senior Vice President of Operations sent a letter to the pilots stressing the carrier's commitment to improvement and announcing a number of changes that would be implemented immediately. These changes included hiring and training to alleviate pilot shortages; increases in "premium pay" rates; lengthened rest hours; increased compensation for PIREPS members once they were elected; and the hiring of a new liaison who would work with the PIREPS board and Horizon's management to implement improvements.

On June 12, 1995, the IBT officially notified Horizon that it was conducting an organization drive among the pilots of the carrier. This notification listed the names of employees involved in the campaign.

Discussions between the PIREPS board and Horizon's management continued into June 1995. In mid-June, Horizon informed PIREPS that the carrier was extending a temporary increase in "premium pay." A June 21, 1995 letter from the

Horizon liaison addressed to pilots announced a few improvements: mandatory rest time would be approved for ten hours, and pilots would be allowed to remove their neckties in the cockpit. In July 1995, Horizon continued to negotiate with PIREPS on issues such as reserve policies, 401(k) matching contributions, and reimbursement policies for "return overnight" expenses. Throughout the IBT campaign, the PIREPS newsletter presented articles and letters representing varying perspectives on the unionization debate.

On September 21, 1995, the IBT filed an application with the NMB claiming that a representation dispute existed involving the pilots at Horizon Airlines. In response, Horizon management informed the PIREPS board on September 29, 1995 that it would not be able to implement any new reform proposals because the company was required to maintain the status quo during the representation dispute and election. Horizon explained that it would be able to complete improvements that were already underway. Following its investigation, the NMB found that a dispute existed and authorized a mail ballot election. On January 19, 1996, the ballots were counted. Of 594 eligible voters, 240 votes were cast for the IBT, sixteen for the Air Line Pilots Association, five for an in-house union, one for "PATCO," and one for "RAPA." Because less than a majority of eligible voters cast ballots, no representative was certified.

On January 23, 1996, the IBT filed a protest with the NMB alleging that Horizon had interfered with the election process. The IBT presented supplementary evidence and argument to the Board on February 9, 1996; Horizon submitted evidence and argument on March 4, 1996. Both parties submitted written responses to the other's submissions. The NMB opened a second investigation, this time to determine whether the carrier interfered with, influenced or coerced employees in their selection of a representative. After examining the

history of the PIREPS program, as well as the carrier's actions during the IBT campaign, the Board found that, "[b]ased upon the totality of the circumstances," Horizon had interfered with employee free choice when it "communicated to pilots that the PIREPS Program was a substitute for a collective bargaining representative; used the PIREPS program to provide work rule improvements during the organizing campaign; represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more input from the pilots." *Horizon Airlines*, Pet. App. 88a. The NMB ordered a rerun election using the Board's standard ballot. The Board also informed the carrier that it would send a notice to employees explaining why the rerun election had been ordered. It required the carrier to post an identical notice "at all stations." Pet. App. 88a. The notice stated that the NMB found employer interference with the election process, and included those portions of the RLA that make such interference unlawful.

The Board conducted a second mail ballot election among the Horizon crewmembers. It counted the second set of ballots on September 12, 1997, and the IBT was certified as the pilots' bargaining representative on September 17, 1997.

The Proceedings Below

On January 23, 1998, Horizon filed suit in the Western District of Washington against the National Mediation Board, alleging that the NMB had acted outside the scope of its authority in finding that the company had interfered in the election and by applying a new standard retroactively. The complaint also alleged that the NMB violated Horizon's constitutional rights by abridging its freedom of speech and forcing it to make a legal admission of interference. The IBT intervened as a defendant in the case. Both the NMB and the IBT moved to dismiss the litigation. The district court dismissed the case with prejudice. Horizon appealed to the

Ninth Circuit Court of Appeals. On November 21, 2000, the Ninth Circuit affirmed the ruling of the District Court.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN ACCORDANCE WITH THIS COURT'S PRECEDENT IN THAT IT APPLIED THE "PEEK AT THE MERITS" STANDARD OF REVIEW TO HORIZON'S CLAIMS

In affirming the district court, the Ninth Circuit Court of Appeals applied the "peek at the merits" standard for reviewing the actions of the National Mediation Board as to both Horizon's statutory and constitutional claims. It relied on this Court's decision in *Brotherhood of Ry. & S.S. Clerks v. Association* for the Benefit of *Non-Contract Employees*, 380 U.S. 650, to find that unless "a peek" reveals a manifest error on the face of the papers the court is without jurisdiction to proceed further. *See Horizon Air Industries*, Pet. App. 12a. The Ninth Circuit panel noted that it adopted the "peek" framework for both constitutional and statutory claims "because 'it furthers the purpose of the RLA' to obtain speedy resolution of representation disputes without the 'haggling and delays of litigation' that a full review on the merits would create." Pet. App. 12a, *citing America West v. NMB*, 119 F.3d 772, 775 (9th Cir. 1997), quoting *Non-Contract Employees*, 380 U.S. at 671.

In *Non-Contract Employees*, this Court observed that where Congress had not authorized judicial review under the Act, it had "often refused to furnish it even where questions of law might be involved." 380 U.S. at 659. The Court's refusal to sanction intrusions into the jurisdiction granted to the Board by Congress was in keeping with the Act's intent that "the dispute was to reach its last terminal point when the

administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.* The Court characterized its role in reviewing the Board's actions as "only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute." *Id.* at 661. The Court quoted *Switchmen's Union* in observing that "the 'highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act' indicates the confidence that it reposed in the Board." *Id., quoting Switchmen's Union v. NMB*, 320 U.S. 297, 305 (1943). "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Switchmen's Union*, 320 U.S. at 302.

In particular, "Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under other sections of the Act." *Id.* at 306. The "highly selective manner" of judicial review permitted by Congress under the RLA led the Court in *Non-Contract Employees* to "hold that the Board performed its statutory duty to investigate and designate the craft or class in which the election should be held and that it did so in a manner satisfying any *possible constitutional requirements* that might exist." *Id.* at 667 (emphasis added). The Court, therefore, applied a narrow standard of review, not simply to allegations of statutory violations by the Board, but to "any possible constitutional requirements that might exist." *Id.*

The Ninth Circuit Court of Appeals' application of the "peek at the merits" standard is in accord with the "highly selective" nature of judicial review of Board actions Congress permitted under the Act. Further, this limited review encompasses both the Board's duty under the Act and "any possible constitutional requirements that might exist." *Non-Contract Employees*, 380 U.S. at 667. The court of appeals was therefore correct when it concluded that the limited

"peek at the merits" standard for both statutory and constitutional claims is "best suited to fulfill [c]ongressional intent, since it will allow courts to check improper NMB actions without causing undue delay in the determination of valid labor representation." Pet. App. 13a-14a.

Other courts of appeal are in accord with the Ninth Circuit Court of Appeal's application of the "peek at the merits" standard of review to both statutory and constitutional claims. The courts of appeal that have discussed *Non-Contract Employees* have determined that court review of Board actions is among the narrowest known to the law and should consist of determining whether a gross statutory violation or constitutional violation appears on the face of the pleadings.[2] Indeed, in a line of cases discussing the appropriate standard of review established by *Non-Contract Employees*, the Circuit Court of Appeals for the District of Columbia concluded that both statutory and constitutional claims against the NMB are

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[2] *See, e.g., British Airways Board v. NMB*, 685 F.2d 52 (2d Cir. 1982)(limited court jurisdiction for alleged statutory or constitutional violations by the Board); *Delpro v. Brotherhood of Ry. & S.S. Clerks*, 676 F.2d 960 (3d Cir. 1982); *International Longshoremen v. North Carolina Port Authority*, 463 F.2d 1 (4th Cir. 1972); *Russell v. NMB*, 714 F.2d 1332, 1339 (5th Cir. 1983)("peek at the merits" review established for both constitutional and statutory claims); *BMWE v. Grand Trunk Ry.*, 961 F.2d 1245, 1249 (6th Cir. 1992)(court is to take only a "peek at the merits" in determining whether the face of the pleadings reveals a gross statutory violation or constitutional violation); *Sedalia Marshall Boonville Ry. v. NMB*, 574 F.2d 394 (8th Cir. 1978)(judicial review of Board actions to be "sparing"); *International In-Flight Catering v. NMB*, 555 F.2d 712 (9th Cir. 1977)(court review is to only take a peek at the merits); *Kiamachi Ry. v. NMB*, 986 F.2d 1341 (10th Cir. 1993)(judicial review of Board actions among narrowest known to the law and a violation of statute or constitution must be apparent on face of the pleadings).

to be decided from a review of the face of the pleadings and not a full examination on the merits.[3]

In *Machinists v. TWA*, 839 F.2d 809, the court of appeals observed "[i]t has been established for over twenty years that courts have no authority to review NMB certification decisions in the absence of the *showing on the face of the pleadings* that the certification was a gross violation of the Railway Labor Act or that it *violated the constitutional rights of an employer, employee or Union.*" 839 F.2d at 811 (emphasis added). The court of appeals went on to state that no such violation appeared on the face of the pleadings under "the 'peek at the merits' permitted to this Court when reviewing NMB decisions." *Id.* at 812. It subsequently repeated this position in *Professional Cabin Crew Ass'n.* 872 F.2d at 459.

The Ninth Circuit Court of Appeals referred to the D.C. Circuit Court of Appeals' opinion in *Professional Cabin Crew Ass'n* in determining that the "peek at the merits" standard should apply to constitutional claims as well as statutory claims. *See* Pet. App. 13a (*citing Professional Cabin Crew Ass'n* and noting that the D.C. Circuit stated in dicta that the "peek at the merits" approach should be applied to constitutional and statutory claims). *Horizon Air*, therefore, is consistent with the established authority of the D.C. Circuit Court of Appeals prior to *USAirways*. If a conflict exists, it is between the D.C. Circuit panel decision in *USAirways* and the prevailing authority of that court of appeals reflected in

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[3] *See, e.g., Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 493 U.S. 974 1989); *Machinists v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988); *Brotherhood of Locomotive Fireman v. NMB*, 410 F.2d 1025 (D.C. Cir. 1969); *Brotherhood of Ry. & S.S. Clerks v. NMB*, 374 F.2d 269 (D.C. Cir. 1966); *Teamsters v. NMB*, 363 F.2d 311 (D.C. Cir. 1966).

Professional Cabin Crew Ass'n and *Machinists v. TWA*.[4] Such a conflict, however, is a matter for the D.C. Circuit Court of Appeals to resolve, and does not merit review by this Court.

Because the decision of the Ninth Circuit Court of Appeals is consistent with this Court's opinion in *Non-Contract Employees* and the consensus of courts of appeal applying *Non-Contract Employees*, the IBT respectfully submits that review by this Court is unnecessary.

II. BECAUSE *HORIZON AIR INDUSTRIES V. NMB* AND *USAIRWAYS V. NMB* ARE DISTINGUISHABLE ON THEIR FACTS AND IN THEIR HOLDINGS, NO CONFLICT CAN BE SAID TO EXIST AMONG THE CIRCUITS

Horizon asserts that a conflict exists between the decision of the Ninth Circuit Court of Appeals in *Horizon Air* and that of the District of Columbia Circuit Court of Appeals in *USAirways v. NMB*, 177 F.3d 985 (D.C. Cir. 1999). A review of the cases, however, reveals they are distinguishable and not in conflict.

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[4] The best reading of *Professional Cabin Crew Ass'n* is that the D.C. Circuit Court of Appeals established a "peek at the merits" standard for both constitutional and statutory claims against the Board. The Sixth Circuit Court of Appeals in *Grand Trunk Ry.* stated:

> We agree with the [D.C. Circuit's] conclusion that judicial review of NMB decisions is permitted 'only upon a showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee or union'. . . . A court should only take a 'peek at the merits' to determine whether the NMB has committed error of that magnitude; if the 'peek' discloses no such error, the case should be dismissed.

citing Professional Cabin Crew Ass'n, 872 F.2d at 459.

In *USAirways*, the District of Columbia Circuit limited its review of USAirways' constitutional claims to the carrier's allegation of having suffered a prior restraint against protected speech before the rerun election. 177 F.3d at 992 ("[W]e have chosen to focus on USAirways' contention that its expression *leading up to the re-run election* was unconstitutionally restrained")(emphasis in original). The court of appeals found that because the NMB's order communicated to the carrier that it could not engage in the protected speech identified by the Board, USAirways would have refrained from engaging in such speech. *Id.* at 994. Further, USAirways made clear that it believed it was restrained from engaging in protected speech by its action in seeking a temporary restraining order against the NMB prior to the rerun election. *Id.* Significantly, the court of appeals found that "the carrier's campaign prior to the initial election was a potpourri of speech *and* conduct, and the Board's order would have to be evaluated under the theory of *Virginia Electric*." *Id.* at 992 (emphasis in original).[5] The court of appeals' holding in *USAirways*, therefore, was limited by its conclusion that USAirways suffered a prior restraint on its speech leading up to the rerun election.

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[5] Under *National Labor Relations Board v. Virginia Electric*, 314 U.S. 469 (1941), this Court noted that "the mere fact that language merges into a course of conduct does not put the whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done." 314 U.S. at 478. The Ninth Circuit Court of Appeals' holding that the Board did not violate Horizon's First Amendment rights when the agency determined that the carrier's speech and conduct in the first election constituted interference is in harmony with *Virginia Electric's* holding that an administrative agency may look "at what the Company has said as well as what it has done" when an employer's actions during an election are a mixture of speech and conduct. 314 U.S. at 478.

In contrast, the Ninth Circuit Court of Appeals addressed both Horizon's claim that the NMB's finding of interference in the first election violated the carrier's First Amendment rights, requiring that the results of the first election be reinstated, and that the carrier suffered a chilling restraint during the rerun election.[6] Pet. App. 24a. In holding that the Board's finding of interference in the first election did not violate the First Amendment, the court of appeals relied on the fact that "the Board's finding that there was carrier interference was not based solely on the carrier's speech." Pet. App. 24a. Rather, "the NMB order repeatedly referred to the aggregate effects of Horizon's speech-related activities and interfering conduct." Pet. App. 25a. As with *USAirways*, therefore, Horizon's actions in the first election were a "potpourri of speech and conduct." 177 F.3d at 992. The Ninth Circuit held, for this reason, that the Board's finding of interference in the first election did not violate the First Amendment. In contrast, the D.C. Circuit Court of Appeals refused explicitly to consider USAirways' claim of a First Amendment violation arising from the Board's finding of interference in the first election. *Id.* No conflict can exist between the decisions on this issue because the Court of Appeals for the D.C. Circuit did not consider the issue decided by the Ninth Circuit Court of Appeals.

No conflict exists between *Horizon Air* and *USAirways* as to the Ninth Circuit's holding that Horizon did not suffer an unconstitutional restraint on speech prior to the rerun election. In affirming the district court's dismissal of Horizon's prior restraint claim, the court of appeals distinguished this case from *USAirways* by noting that Horizon had failed to seek a temporary restraining order prior

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[6] In contrast to Horizon's requested relief, USAirways did not seek a reinstatement of the results of the first election. 177 F.3d at 992.

to the rerun election. Pet. App. 27a. It further noted that USAirways'

> TRO application was 'predicated in part on its chill theory, after the Board had issued its order and before the re-run election was held' and by filing suit immediately, the carrier 'was hardly sitting on its claim.' In contrast, Horizon did not file for a TRO, but waited for the result of the second election.

Pet. App. 26a-27a, *quoting USAirways*, 177 F.3d at 994. Stressing the importance of the quick disposition of disputes under the RLA, the court of appeals held that "allowing a carrier to wait to press its claim until after it has lost the second election would be contrary to the [c]ongressional intent in establishing the NMB." Pet. App. 27a. Because of the differing factual postures of *Horizon Air* and *USAirways* on the issue of a prior restraint of speech, no conflict can be said to exist and review by this Court is unnecessary.

III. *USAIRWAYS* AND *HORIZON AIR* DIFFER ONLY IN THE GENERAL LEGAL PRINCIPLES APPLIED AND DO NOT PRESENT A CONFLICT THAT IS EITHER IMPORTANT OR RECURRING SO AS TO JUSTIFY REVIEW BY THIS COURT

The holdings of *USAirways* and *Horizon Air* reflect nothing more than a difference in the application of general legal principles. The D.C. Circuit Court of Appeals focused its review on the Board's actions in exerting a prior restraint that interfered with USAirways' exercise of protected speech in the rerun election. Under such an analysis, it focused only on "pure speech" rather than speech mixed with conduct. For this reason, the court of appeals held that the Board's determination was subject to a full review on the merits and it read the Board's *USAirways* factors disjunctively because, in the prior restraint context, the carrier had not yet had an

opportunity to engage in conduct that might mix with its speech.

The Ninth Circuit Court of Appeals, however, was presented with a record in which Horizon failed to seek injunctive relief prior to the rerun election and relied only on an argument that the Board's finding of interference in the first election constituted a violation of its free speech right.[7] As the court of appeals noted, however, such an inquiry was inherently based on both the Carrier's speech *and* its conduct in the first election. Because the carrier failed to seek instruction as to its right to speak in the rerun election, neither the Board nor the court of appeals was presented with an issue of Horizon's right to engage in "pure speech."[8] Pet. App. 28a (". . . if Horizon was confused about the NMB's order, it could have sought a TRO before the second election.") In light of the differing factual postures in the two cases, we cannot know how the Ninth Circuit would address the pure speech issue that arose in *USAirways* or how the D.C. Circuit would address the mixed speech and conduct issue presented by *Horizon Air*. This difference between the circuits is simply a conflict in the principle underlying the analysis of these cases: pure speech versus speech mixed with conduct. Such a conflict in principle, however, does not constitute a matter meriting this Court's review. *See* ROBERT STERN ET AL., SUPREME COURT PRACTICE § 4.3 (6th Ed. 1986).

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[7] Horizon did not urge the court of appeals that the NMB had engaged in a prior restraint of its speech until oral argument before the panel. Pet. App. 19a.

[8] Even when the NMB reviews allegations of election interference based on employer communications outside the employee committee context, it does not focus on "pure speech" but on the totality of the circumstances. *American Airlines*, 26 N.M.B. 412, 448 (1999).

In addition to the fact that the two circuits differ only in the legal principles applied, *Horizon Air* and *USAirways* were limited to the narrow issue of Board findings of election interference arising from employer treatment of employee committees. The decisions do not address the issue of employer speech generally.[9] The holdings in both *Horizon* and *USAirways* demonstrate that employer actions in the employee committee context are a "potpourri of speech and conduct" and that the Board can make findings of interference on the basis of that mixture without impinging on pure employer speech. 177 F.3d at 992; Pet. App. 23a.

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[9] In evaluating allegations of interference arising from employer speech, the Board holds that "Carriers have a right to communicate their views during election campaigns. . . . such is not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election. . . . the Board has analyzed allegations of improper communications in the context of a totality of the circumstances." *American Airlines*, 26 N.M.B. at 446. The Board interprets this standard as requiring that employer communications include a threat of retaliation for organization or promise of benefit in order to constitute interference.

> The Board examines the content of the [employer] communications to determine whether the communications are coercive, contain material misrepresentations, particularly about the Board's processes or the Act, or, combined with other Carrier actions, influence the employees in their choice of representative. Typically, the Board has found interference where the communications include threats about the consequences of voting for an organization.

26 N.M.B. at 448. The Board's analysis of such communications is based on the "totality of the circumstances" and not "pure speech." *Id.* This standard is consistent with this Court's holding in *Gissel*. *See National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)(employer speech is not protected if it constitutes a "threat of reprisal or force or promise of benefit").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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